

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:)
)
Rocky Well Service Inc., and) **E.A.B. Docket Nos. 08-03 and 08-04**
Edward J. Klockenkemper,) **(SDWA-05-2001-002 (40 CFR Part 22))**
) **(Consolidated)**
Respondents)
)

Respondent E.J. Klockenkemper’s Motion for Oral Argument
Via Video TeleConferencing Facilities at Region 5 EPA

Respondent E.J. Klockenkemper, by and through undersigned counsel, requests that oral argument be allowed to Mr. Klockenkemper and be scheduled prior to a final decision by the Board in the above-captioned matter, for the reasons set forth below. In addition, in order to reduce costs to the parties in light of the current economic circumstances and in the spirit of resource conservation, Respondent requests that oral argument, if granted, be presented to the Board remotely by the Parties’ counsel at and via Region 5 EPA’s teleconferencing facilities in Chicago, IL. In support hereof, Respondent also states that:

1. After thorough review of EPA’s 70 page Response Brief in this matter, and in light of the lengthy and complex arguments of the Parties both below and to the Board, it is believed by movant that oral argument would assist the Board in its deliberations and focus it on the important issues presented by the case.
2. This matter presents constitutional and federal question issues of first impression for the Board and the U.S. EPA, which, being for the most part issues of interpretation of a federal statute (*SDWA Sec 1421, 42 USC 300h*) that is codified in Illinois by a State law adopted by EPA as the federally-approved SDWA UIC program for Illinois (*Oil and Gas Act - 225 ILCS 725, see 40 CFR 147.701*), are of a complex, particular, state-specific nature such that oral argument would materially assist in their resolution at this level, and would help focus the matter for likely further appeal.
3. To wit, the Region asks the Board to interpret various federal regulations and statutes to create a third prong of direct “operator” liability under Sec. 1421, 42 USC 300h, for Mr. Klockenkemper (“EJK”), under the theory that, as president, operating officer and

environmental affairs officer of permittee Rocky Well Service, Inc., EJK was liable under the terms of the state statute as an “operator” of a permitted, corporate operator of an injection well. *See EPA Response Brief at pp14-27.*

4. This is an issue of first impression since 225 ILCS 725 does not expressly provide for liability for any person other than 1) the permittee (here RWS) or 2) someone who injects or drills a well without first obtaining a permit, and since there is no Illinois caselaw bearing directly on this 225 ILCS 725 issue. *See May 2, 2009, Revised EJK Brief at pp4-14.*
5. Relatedly, oral argument would also allow Respondent to address the Region’s new statutory and regulator liability arguments directed against himself as delineated in Respondent EJK’s April 15, 2009, *Motion to Strike*, in the event that the Board declines to strike the two new arguments made in the Region’s Response. *See EPA Response Brief at pp10* (alleging that the “permittee” interpretation/liability issue is an affirmative defense and is not jurisdictional), *and at pp 17-20* (alleging that 40 CFR 144 and 145 “contemplate” and require the Board’s creation or recognition of “operator of an operator” liability under 225 ILCS 725).
6. Secondly, the Region’s novel liability theory that 225 ILCS 725 regulates an “operator of an operator” also raises constitutional due process notice issues of first impression as to EJK’s right to be notified by text of the SDWA in Illinois that he could be held personally and directly liable as an a corporate officer of a permittee corporation without the Region being required to plead and prove that the court should “pierce the corporate veil” to do so. *See EJK Revised Brief at pp4-18.*
7. Relatedly, Region 5 presents an issue of first impression by its claim that the federally-approved regulations located at 62 Ill. Admin. Code 240, which implement 225 ILCS 725, and especially the notice requirements of 62 IAC 240.150, do not apply to EPA despite the fact that these are the federally-adopted SDWA program requirements in Illinois. *See EPA Response Brief at pp34-35.*
8. Thirdly, the Region also presents an issue of first impression in its requested application of 28 USC 2462 to RWS’s one-time failure to test each of the six wells, interpreting the Sept. 1, 1995 and Dec. 19, 1996 violations as “continuing” for 28 USC 2462 accrual purposes such that the accrual of EPA’s right to sue was tolled until the test was performed (after the July 9, 2001, complaint was filed), despite the fact that 225 ILCS 725 requires such test only once each 5 years, and does not impose a continuous monitoring or daily testing requirement. *See*

EJK Revised Brief at pp18-29.

9. Fourthly, the matter presents a constitutional issue and federal question of first impression by way of the Region's attempted imposition of joint and several liability and penalty upon both RWS and EJK, despite the fact that 225 ILCS 725 does not contain a joint and several liability scheme, thus rendering the imposition of penalty usurious and incorrect as to both RWS and Mr. Klockenkemper. *See EJK Revised Brief at p55.*
10. The foregoing and numerous other novel issues presented and argued by the parties render this matter appropriate for oral argument and questioning from the Board as to the competing, complex and interwoven statutory and regulatory interpretations the resolution of which likely will be of significance to both EPA and the regulated UIC community.
11. Oral argument is also appropriate given the Respondent's position that he has not been given full opportunity to present his arguments to the Board in the EJK Revised Brief due to an unprecedented post-facto imposition of a 70 page limitation even though no page limit rule existed for appellate briefs when Respondent's initial Oct. 30, 2008, 2-part brief was submitted.
12. Region 5 was notified in advance of this Motion, and while it did not specifically object to same, the Region did state it did not believe oral argument was necessary and declined to join Respondent in this request.

For the foregoing reasons Respondent EJK respectfully requests the Board to grant and schedule oral argument for Respondent, granting Mr. Klockenkemper time separate and apart from any time for argument to be sought by or granted to RWS and its counsel. Respondent also requests that the Board allow and order any argument to be presented to the Board by the Parties to occur by way of and utilizing the Region 5 teleconferencing facilities in Chicago, IL., whereby air travel and other costs and impacts attendant to travel to and lodging in Washington D.C. for up to 4 counsel can be avoided.

Respectfully Submitted By: [s/: Felipe N. Gomez](#) Date: April 22, 2009

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